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JOHN S. PRATT, ESQ KILPATRICK STOCKTON, LLP 1100 PEACHTREE STREET ATLANTA, GA 30309			EXAMINER NGUYEN, THANH T	
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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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*Ex parte* MATT AYERS, BEN BLACK, CHRIS BROWN,  
JOHN CARLSON, DAN COHN, SCOTT LAIRD, JON MILLER,  
STEPHEN RAMSEY, OPHIR RONEN, PAUL SCHACHTER,  
and OSCAR STIFFELMAN

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Appeal 2008-2560  
Application 09/575,839  
Technology Center 2100

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Decided: August 26, 2008

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Before JEAN R. HOMERE, ST. JOHN COURTENAY III, and STEPHEN  
C. SIU, *Administrative Patent Judges*.

SIU, *Administrative Patent Judge*.

DECISION ON APPEAL

I. STATEMENT OF THE CASE

Appellants appeal under 35 U.S.C. § 134(a) from the Examiner's  
Final Rejection of claims 1-21, 32-53, and 64. We have jurisdiction under

35 U.S.C. § 6(b). An oral hearing for this appeal was conducted on August 13, 2008.

We affirm-in-part.

#### A. INVENTION

The invention at issue involves redirecting request for content to a particular content server in a group of content servers based on a cost function indicative of operational characteristics of the network (Spec. 1).

#### B. ILLUSTRATIVE CLAIM

Claim 1, which further illustrates the invention, follows:

1. A method for directing a first network client requesting access to content to one of a plurality of content servers that can provide said content, comprising:

if one or more cost measurements are available that measure operational characteristics of the network based on communication between the first network client and one or more of the plurality of content servers, then directing the first network client to a said one of said content servers based on the one or more cost measurements;

otherwise, directing the first network client to a said one of said content servers using one or more cost measurements that measure operational characteristics of the network based on communication between a second client that is physically proximate to the first network client and one or more of the plurality of content servers.

### C. REJECTION

Claims 1-8, 10-18, 20, 21, 32-40, 42-50, 52, 53, and 64 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over U.S. Patent No. 6,006,264 (“Colby”) and U.S. Patent No. 6,591,298 (“Spicer”). Claims 9, 19, 41, and 51 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Colby, Spicer, and U.S. Patent No. 6,526,283 (“Jang”).

### II. CLAIM GROUPING

When multiple claims subject to the same ground of rejection are argued as a group by appellant, the Board may select a single claim from the group of claims that are argued together to decide the appeal with respect to the group of claims as to the ground of rejection on the basis of the selected claim alone. Notwithstanding any other provision of this paragraph, the failure of appellant to separately argue claims which appellant has grouped together shall constitute a waiver of any argument that the Board must consider the patentability of any grouped claim separately.

37 C.F.R. § 41.37(c)(1)(vii) (2006).<sup>1</sup>

Appellants argue claims 1-7, 12-17, 33-39, and 44-49 as a first group (App. Br. 12-14); claims 32 and 64 as a second group (App. Br. 14-15);

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<sup>1</sup> We cite to the version of the Code of Federal Regulations in effect at the time of the Appeal Brief. The current version includes the same rules.

claims 10, 11, 20, 21, 42, 43, 52, and 53 as a third group (App. Br. 15-16)<sup>2</sup>; claims 8, 18, 40, and 50 as a fourth group (App. Br. 17); and claims 9, 19, 41, and 51 as a fifth group (App. Br. 17-18).

We select claim 1 as the sole claim on which to decide the appeal of the first group and claim 32 as the sole claim on which to decide the appeal of the second group. We decide claims of the third, fourth, and fifth groups with claims of the first group.

### III. CLAIMS 1-21 AND 33-53

Independent claims 1, 12, 33, and 44 recite that if cost measurements based on communication between a first network client and a plurality of content servers are not available, then directing the first network client to a content server using cost measurements based on communication between a second client that is physically proximate to the first network client and the content server. Appellants assert that “Colby describes selecting a server based on the proximity of the requesting client to the servers” but “does not consider the proximity of clients to one another” (App. Br. 12) and that “Spicer does not describe that measurements between one POP and a server can be used for routing communications from a separate POP that is physically proximate to the first POP” (App. Br. 13).

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<sup>2</sup> Appellants place claims 11, 21, 43, and 53 in a different heading in the Appeal Brief but rely on the same arguments with respect to deficiencies in the cited references as applied against claims 10, 20, 42, and 52.

The Examiner finds that Spicer discloses “a first client and a second network client as shown in fig.4 of Spicer and col.4, lines 30-55” (Ans. 12). While the Examiner demonstrates that Spicer discloses multiple clients connected to a network (Fig. 4), the Examiner does not demonstrate that Spicer or Colby also discloses directing a first client for which cost measurements are not available to a server using cost measurements based on communication between a second client (that is located proximate to the first client) and the content server.

Spicer discloses that the “costing agent 120 obtains cost information for each measurement target by requesting data such as a web page” (col. 6, ll. 66-67). If the costing agent obtains cost information for each measurement target, it stands to reason each target has cost information available. Therefore, it appears that Spicer fails to disclose a situation in which cost measurements are not available for a first network client. Even assuming that a target in Spicer does not have available cost measurement data, the Examiner has not demonstrated that Spicer discloses directing the target to a content server based on cost measurements that are based on communication between a second client and the content server, the second client being located proximate to the first client.

In addition, the Examiner has not demonstrated or asserted, that Colby or Jang demonstrates these features.

Therefore, we reverse the rejection of independent claims 1, 12, 33, and 34, and of claims 2-11, 13-21, 34-43, and 45-53, which depend therefrom.

#### IV. CLAIMS 32 AND 64

Claim 32 recites measuring network latency between a network server and network clients, determining physical distances between the network clients and an inferable network client, and computing a weighted average of the latency measurements as a function of the distances. Appellants argue that “Colby does not describe using measurements associated with one client to infer or estimate performance for a different or inferable client” and that “Spicer does not describe using measurements associated with one client to route another client to a server” (App. Br. 15).

Claim 32 recites measuring network latency, determining physical distances, and computing a weighted average. Claim 32 does not recite or require using measurements associated with one client to route another client to a server. We also note that Appellants have not indicated a definition of the term “inferring” or “inferable” or pointed out a definition for these terms from the instant Specification. Therefore, even assuming that Appellants’ assertion that Spicer does not describe using measurements associated with one client to route another client to a server is true, we find Appellants’ arguments to be unavailing because claim 32 does not require this feature.

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Therefore, we affirm the rejection of claim 32, and of claim 64 which falls therewith.

#### VII. ORDER

In summary, we reverse the rejections of claims 1-21, and 33-53 under § 103(a) and we affirm the rejection of claims 32 and 64 under § 103(a).

No time for taking any action connected with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED IN PART

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